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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE and ROBERT H. QUINN, *Appellants*

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., *Appellees*

On Appeal From the United States District Court for the District of Massachusetts

MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE and ROBERT H. QUINN, *Appellants*

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., *Appellees*

On Appeal From the United States District Court for the District of Massachusetts

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move that the preliminary injunction issued by the district court on December 6, 1969 (Juris. St. 29-30) be summarily affirmed on the ground that the decision of the court below is plainly correct and that the delay incident to plenary review on the merits will irreparably injure appellees.

QUESTIONS PRESENTED

1. Whether the district court properly issued a preliminary injunction against *future* interferences by law-enforcement authorities with the appellees' exhibition of the motion picture film "I Am Curious (Yellow)" to adults only in an adequately controlled, privately owned theatre on the ground that the applicable Massachusetts obscenity statute was probably unconstitutional for overbreadth under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

2. Whether the district court was required to abstain from considering the appellees' claim because a local criminal prosecution was instituted against the appellees after the commencement of this action.

STATEMENT

Appellees are exhibitors of motion pictures who have shown the Swedish film "I Am Curious (Yellow)" and wish to show it in the future.[1] The film was held to be constitutionally protected against government suppression in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (2d Cir. 1968), a decision which the United States did not seek to have reviewed in this Court. The same film is before this Court in *Grove Press, Inc.* v. *Maryland State Board of Censors*, No. 905, this Term. The court below declined to consider the film's alleged obscenity in this case.

On May 28, 1969 (a Wednesday)—several months after the decision of the Court of Appeals for the

[1] The two corporations own motion picture theatres adjacent to each other in Boston. Appellee Vlamos is president of both corporations and appellee Karalexis is the theatre manager for both theatres.

Second Circuit had become final—the film began to play at appellees' theatres—the Symphony Cinema I and Symphony Cinema II. On the following day, search warrants were obtained by officers of the Boston Police Department from the clerk of a local court for the seizure of the film, and the prints thereof were seized. On May 30, a criminal complaint was filed charging appellee Karalexis with having violated Mass. Gen. Laws, ch. 272, Sections 28A and 32. On the same day, a justice of the local court directed that the prints of the film be returned to the appellees with the understanding that exhibition of the film could continue, provided that no one's privacy was invaded and no minors were admitted to the theatre. Exhibition of the film was resumed on that day. On the following Tuesday—June 3, 1969—appellees were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit, and exhibiting, an obscene motion picture in violation of Sections 28A and 32. The complaint against appellee Karalexis was dismissed on the following day.

On June 14, 1969, appellees instituted this action in The United States District Court for the District of Massachusetts, challenging the constitutionality of the statutes under which they had been indicted on June 3 on a variety of grounds, including the absence of any specific requirement for *scienter*, see *Smith* v. *California*, 361 U.S. 147 (1959). On June 17 and on June 21, an amended complaint and an amendment to the amended complaint were filed. On June 24, 1969, the three-judge district court acted on appellees' request for a preliminary injunction (Appendix A, pp. 1a-3a, *infra*). The court observed that the cited provisions of Massachusetts law "may appear to be unconstitutional on their face in that they make crim-

inal the publication of obscene matter in the absence of knowledge of the content of the publication. [Citation omitted.] The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. [Citation omitted.] The [Massachusetts] court has not passed upon section 32 in this respect."

The three-judge court then noted that it had been represented in open court that the indictments issued on June 3 did not contain any allegation of *scienter*, and that such an allegation was necessary because otherwise the grand jury might have indicted without having found that element to exist. The court then concluded as follows (p. 2a, *infra*):

> A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

The court below thereupon unanimously issued a temporary injunction (Appendix B, p. 3a, *infra*) enjoining all action by appellant Byrne pursuant to

the indictments of June 3 other than those incident to consideration by the court of an appropriate motion to dismiss. Motions to dismiss were filed by appellees in the State court on June 25, 1969. The motions were not opposed by appellant Byrne and were granted on the same day. The dismissal of the indictments left no local criminal proceedings outstanding against appellees.

On June 30, 1969, appellees returned to the United States District Court with a further amendment to their complaint (Appendix C, pp. 4a-7a, *infra*). They alleged therein that they had been requested to supply to the office of appellant Byrne a print of the film to be used in further investigations and presentations to the grand jury, and that the print had been made available. The amendment further alleged that appellees "do anticipate that further indictments will be sought against them" by appellant Byrne for violation of Mass. Gen. Laws, ch. 272, § 28A. The amendment again challenged the constitutionality of Section 28A, requested that the court declare it to be unconstitutional on its face and as applied to the appellees, and asked that appellant Byrne be enjoined from instituting "any future prosecutions" (paragraph (7)) and "any further prosecutions" (paragraphs (8) and (9)).

Shortly *after* the complaint was filed, the Suffolk County Grand Jury issued indictments against the appellees for violation of Section 28A.[2] On July 15, 1969, the three-judge district court denied appellees' request that the proceedings on the second indictments

[2] Section 32 was not involved in this second set of indictments, possibly because it has never been locally construed as requiring proof of *scienter*.

—begun *after* the filing of the amended complaint—be enjoined (Appendix D, pp. 8a-9a, *infra*). It did, however, provide that the motion for injunctive relief could be renewed "if and when petitioner is convicted in the Superior Court." Appellant had stipulated "that no seizure of the film or interruption with the showing will be made" pending the outcome of the proceedings, and the court added that if the stipulation were renewed in case of conviction, "the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur."

The court below declined to consider the question whether the film was obscene, but, in the event the case were to return to federal court and in order to aid it in determining whether the statute is unconstitutional on its face or as applied, it invited briefs on several legal issues relating to *Stanley* v. *Georgia*, 394 U.S. 557 (1969).[3]

The trial of appellees on the second set of indictments was held before Chief Judge Tauro (jury being waived) in Suffolk Superior Court between July 15 and July 30, 1969. After taking the case under ad-

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[3] The court's opinion asked counsel to brief the following questions:

> If an adult individual may view obscene material in the privacy of his home,
>
> a) can he purchase obscene material for such purpose?
>
> b) can he invite friends to the viewing?
>
> c) can he go to a private place to view such material?
>
> d) can a group of persons go to such private place?
>
> e) can they go to an adequately controlled public place?

Briefs were submitted by appellees and by Grove Press, Inc. (the distributor), which was invited to participate *amicus curiae*, and the court heard oral argument on these issues

visement, the State judge on November 12, 1969, found the film obscene, and sentenced appellee Vlamos to one year's imprisonment and the other appellees to pay fines. Appellant Byrne thereafter refused to renew the earlier stipulation regarding noninterference with future exhibition of the film *pendente lite* and stated that he would seek additional indictments if exhibition of the film were continued. Appellees then ceased showing the film in Boston, because of the threat of multiple prosecution.

Appellees then returned to the federal district court seeking injunctive relief against *future* prosecutions by appellant Byrne if they resumed exhibition of the picture. In this posture of the case—without interfering with the judgments of conviction entered against appellees on November 12—the majority of the court below on November 28, 1969, issued an opinion in which it determined that Section 28A would probably be declared unconstitutional, after plenary consideration, and that in light of the irreparability of appellees' injury a preliminary injunction would be issued against *future* interference with appellees' exhibition of the film. On December 6, 1969, the order was issued,[4] and it was stayed by this Court, pending the timely filing and disposition of an appeal, on December 15, 1969.

ARGUMENT

Demonstrating more than ample sensitivity to considerations of federalism, the court below refused on June 24, 1969, and on July 15, 1969, to interfere with State court proceedings—the first time with indictments (subsequently dismissed) filed *prior* to the commencement of this action and the second time with indictments which were issued *after* the appellees'

[4] Appellant Quinn was also added as a party on that date.

amended complaint was filed. Finally—after permitting the State courts to conclude an extensive trial which resulted in a sentence of a year's imprisonment for the exhibition of a motion picture which was rated as one of "The Twenty Best Films of 1969" by the *New York Times* film critic[5]—the court below considered the constitutionality of the underlying State statute, found it probably deficient, and issued an interlocutory injunction under which *future* interference with the film's exhibition was enjoined. This order did no more than permit the film to be shown while plenary consideration could be given by the federal court to appellees' request for a declaratory judgment and appellate remedies could be pursued with respect to the State conviction. We submit that that decision by the court below was plainly correct, reflected a proper weighing of the probability of success in the

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[5] See *New York Times*, Dec. 28, 1969, Sec. D, pp. 1, 13 and 26. Other serious commentary on the film appears in Smith, C. B., "I Am Curious—Yellow and Blue," *Film Quarterly* Vol. 22, No. 4 (1969); Steele, R., "I Am Curious—Yellow," *Friends Journal*, Vol. 15, No. 16 (1969); Weinraub, B., "Obscenity or Art," *N. Y. Times*, July 27, 1969, P. 24; Simon, J., "Getting Furious Over Curious," *N. Y. Times*, February 9, 1969, p. 1; Steele, R., "Esthetique du Mal," *Film World*, Spring, 1970; Kelman, K., "Imaginations," *Film Culture*, Spring 1964 at pp. 16-19, Schickel, R., "Review" in *Life*, March 21, 1969; Cox, H., "Review" in *Tempo*, Vol. 1, No. 17 (1969); Schickel, R., "It Takes Nothing But the Heart", *Life*, Atcheson, R., "Review", *Holiday*, December, 1968; Gross, L., "Review", *Look*, April 29, 1969; Morgenstein, Joseph, "Review", *Newsweek*, March 24, 1969, p. 114; Hatch, R., "Review", *The Nation*, March 24, 1969; West, A., "Review", *Vogue*, April 15, 1969; "Review", *Time*, March 14, 1969; Alpert, H.; "Review", *Saturday Review*, March 15, 1969; Kauffmann, S., "Review", *The New Republic*, March 15, 1969; Gilliatt, P., "Review", *The New Yorker*, April 5, 1969, p. 97; Trotta, G., "Review", *Harper's Bazaar*, June 1969; Aarons, Leroy, "Answering Curious Questions", *Washington Post*, March 11, 1969.

federal court action and the irreparability of harm to the appellees, and should be affirmed summarily.

Before moving to the reasons underlying the above conclusion, we draw the Court's attention to the interrelationship between this case and *Grove Press, Inc.* v. *Maryland State Board of Censors*, No. 905, this Term. That case involves the censoring as obscene of the same film which gave rise to this case, and appellants in No. 905 (the distributor and exhibitor of the film) have urged, *inter alia*, that the Court summarily reverse the decision being appealed in that action, on the authority of *Redrup* v. *New York*, 386 U.S. 767 (1967). Were the Court to adopt that course —and thereby agree with the Court of Appeals for the Second Circuit that "I Am Curious (Yellow)" is constitutionally protected and non-obscene—the present action would become moot. For, in such event, the appellants or anyone acting on their behalf would be constitutionally prohibited from doing what the appealed order prohibits—*i.e.*, proceeding civilly or criminally against, or otherwise interfering with, appellees on account solely of their exhibition of the film to adults in a non-obtrusive and non-"pandering" manner (compare Juris. St. 29-30)—irrespective of the validity of the rationale given by the court below in support of its order. If the Court were, therefore, to decide upon the first course proposed by the appellants in No. 905, the appropriate disposition of this action would be to direct that the judgment below be vacated and the cause be dismissed as moot.

1. The decision of the court below that the First and Fourteenth Amendments, as interpreted in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), probably bar State interference with exhibition of the motion picture at

issue here in a privately owned, adequately controlled theatre from which minors are excluded, is a proper and valuable interpretation of this Court's recent decisions in the obscenity area. The Court's opinion in *Stanley* held explicitly that the First Amendment (as made applicable to the States by the Fourteenth) secures both "the right to receive information and ideas" (394 U.S. at 564) and "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" (*ibid.*). Recognition of this double-barreled right was interpreted by the Court to establish an individual's constitutionally protected "right to read or observe what he pleases." 394 U.S. at 565 and 568.

This Court in *Stanley* marked a clear line between "the power of the State and Federal Governments to prohibit or regulate *certain public* actions taken or intended to be taken with respect to obscene matter" (394 U.S. at 561; emphasis added) and the authority of government "to protect the individual's mind from the effects of obscenity" (394 U.S. at 565). While reaffirming its holding in *Roth* v. *United States*, 354 U.S. 476 (1957), that governmental police power of the former type may legitimately be exercised with respect to obscenity, the Court in *Stanley* determined that there was no room under the First Amendment for government efforts "to control the moral content of a person's thought." 394 U.S. at 565.

The court below correctly concluded, on its preliminary consideration of the legal issues, that Section 28A of Mass. Gen. Laws, ch. 272, was unconstitutionally overbroad in that it ranged impermissibly into the field of "thought control." For it was entirely clear from the stipulated facts that there was no possible State interest in interfering with appellees' exhibition of

the film than the one prohibited by *Stanley* v. *Georgia*. The majority opinion below observed: "Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginzburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter." Juris. St. 17.

The court below properly concluded on the stipulated facts, that the law under which State prosecutions might be brought involved none of the "valid governmental interests" with respect to the regulation of obscenity which had formed the basis for the Court's decision in *Roth*, and which were explicitly recognized in *Stanley* and in this Court's *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767, 769 (1967), as interests capable of being pursued consistently with constitutional requirements.[6] As the *Stanley* opinion stated: "[*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg* v. *New York*, *supra*,

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[6] In *Redrup*, the Court enumerated the legitimate interests as follows: "... a specific and limited state concern for juveniles ... an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it ... [and] the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*, 383 U. S. 463." 386 U. S. at 769. See the analysis of *Redrup* and of the development of the "assault" theory in deGrazia, ***Censorship Landmarks*** (N.Y., R.R. Bowker, 1969) at pp. xxix-xxxii.

or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York* . . . . No such dangers are present in this case." And, no such dangers were present in the case below. The case presented the bald question of whether the Commonwealth of Massachusetts might enforce its obscenity law to prevent willing adults from seeing a film in a private motion picture theatre—"adequately controlled" as to juveniles, pandering, and possible intrusions on privacy.

Under the narrowest reading of *Stanley*, it is indisputably clear that any adult who wishes to view "I Am Curious (Yellow)" in his library or basement has a constitutionally secured right to "receive" (394 U.S. at 564) and to view it. The conclusion of the majority below—"[i]f a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library" (Juris. St. 19-20)—follows inexorably unless the First Amendment protects only the limited and privileged few who are able to afford to purchase films.

Even before *Stanley*, there was a developing consensus of legal scholars on the *Stanley* principle—*i.e.*, the simple and straightforward proposition that governmental interference with the distribution or receipt of written, printed or artistic material is warranted only as protection against unwanted transmissions to unwilling audiences and against assaults on private sensibilities, or as protection for juveniles. As *for willing adults*, the First Amendment preserves the "right to receive information and ideas, regardless of their social worth." 394 U.S. at 564. One recent commentator has stated the rule as follows: ". . .

obscenity is vested with constitutional protection subject to divestment upon a finding of distribution to minors or exposure to an unwilling (captive) audience." Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 Supreme Court Review, 203, 217 (1969).[7]

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[7] See also Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185, 229, 232 (1969):

> "... [T]he state may not enact legislation which has as an objective the protection of adults from themselves."
>
> "... it seems impossible to justify recognition of a legitimate state interest in protecting the citizen's sensibilities with regard to sexual expression just as such an interest cannot be justified when religious or political expression is at issue."

Morreale, *Obscenity: An Analysis and Statutory Proposal*, 2 Wisc. L. Rev. 421, 455 (1969):

> "... the only clearly legitimate interest a state can protect by censorship of obscene representations to adults, is the interest of persons to avoid unwilling confrontation with obtrusive, obscene representations."

Elison and Graham, *Obscenity: A Compromise Proposal*, 30 Mont. L. Rev. 133, 134 (1969):

> "Any material, reproduction, object of art or what have you should be available for purchase by the adult population with the only restriction being that it cannot be forced upon them."
>
> "Adults who wish to be exposed to offensive material may risk corrupting themselves. This is a minor concession to free speech and to a more practical solution to the problem of morally offensive material."

The Supreme Court, 1968, 83 Harv. L. Rev. 7, 147, 153 (1969):

> [Obscenity may be banned] "only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake .... In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will."

Recent lower-court State and federal decisions have followed a similar approach to *Stanley*. See, *e.g.*, *United States* v. *Thirty-Seven Photographs*, U. S. Dist. Ct. C. D. Calif., Civil No. 69-2242-F (January 27, 1970)[8]; *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *prob. jurisd. noted*, No. 565, this Term (December 8, 1969); *California* v. *Leavens*, Munic. Ct., Fresno Judicial District, Calif., Nos. 400,000 and 40,415 (February 4, 1970) (alternative holding).

The rule advanced in *Stanley*, as applied by the court below to the stipulated circumstances of this case, casts the law of obscenity regulation in a form which removes many of the difficulties surrounding its past application, and brings it into conformity with the larger constitutional principles of freedom of expression. For these reasons, the judgment below should be affirmed.

2. The court below correctly denied the request that it "abstain" from passing on the constitutionality of the Massachusetts statute—inasmuch as the anti-injunction statute (28 U.S.C. 2283) plainly was inapplicable and because this Court's decisions regarding the "abstention" doctrine required the court below to consider the merits of the complaint. See Juris. St. 20-21.

(a) This Court noted in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965), that the prohibition of 28

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[8] In *Thirty-Seven Photographs*, the court determined that 19 U.S.C. 1305 was unconstitutional as applied to the importer of 37 photographs for incorporation "in a book for distribution." The court held that the statute "prohibits a person who may constitutionally view pictures of [*sic*] the right to receive them." In reasoning paralleling that of the court below, it said, "The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent."

U.S.C. 2283 applies only to pending "proceedings"—*i.e.*, to State court actions which are *in esse* at the time of the filing of the federal complaint. In this case, the only "proceedings" which were instituted prior to the filing of the initial complaint were the indictments of June 3, 1969, and they were subsequently dismissed and are not in issue here. At the time of the filing of appellees' last amendment to their complaint on June 30, 1969, there were no outstanding criminal prosecutions. The amendment (reprinted in full at pp. 4a-7a, *infra*) requested prospective relief only. Like the complaint in *Dombrowski*, it sought injunctive relief against *threatened prosecutions to be instituted in the future;* it did not ask the federal court to interfere with any previously instituted State proceeding. We emphasize this fact particularly because two Justices of this Court apparently construed the facts otherwise, in passing on appellants' application for a stay pending appeal. See *Byrne* v. *Karalexis*, Application for Stay, decided December 15, 1969, 90 S. Ct. 469. The chronology documented in our Statement, pp. 2-7, *supra*, makes clear that the court below had *not* "stepped into the middle of a state criminal prosecution" (Opinion of Mr. Justice Black) and that the action did not violate the rule "that federal courts refrain from interfering in pending state criminal prosecutions" (Opinion of Mr. Justice Black, quoted in the Opinion of Mr. Justice Stewart). Indeed, as we demonstrate at pp. 21-22, *infra*, the court below acted in a factual context in which there existed "the threat or actuality of repetitive prosecutions for exhibition of the film in question"—referred to by Mr. Justice Stewart as a justification for intervention in his separate opinion.

(b) The court below was not required to "abstain" any longer than it did under the judicially created abstention doctrine of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), applied most recently by this Court in *Reetz* v. *Bozanich*, No. 185, this Term, decided February 25, 1970. As the facts recited in our Statement (pp. 2-7, *supra*) demonstrate, the court below did, in fact, "abstain" at two earlier junctures in this action: On June 24 it deferred decision on the issue whether an allegation of *scienter* was constitutionally necessary in an indictment alleging violations of the obscenity statute. That issue was resolved by the State court's dismissal of those indictments for failure to allege *scienter*.

Thereafter, on July 15, 1969, the court below refused to enjoin criminal proceedings instituted *after* the filing of appellees' complaint, even though the court must have had substantial doubts regarding the constitutionality of the underlying statute. The purpose of this action was plainly to permit the State trial court to pass, in the first instance, on the constitutional challenge.[9] Once that claim was rejected and the appellant refused to renew his agreement under which exhibition of the film could continue *pendente lite*, the federal court was faced squarely with a constitutional issue of substantial magnitude—whether this film could be effectively suppressed by threats of future prosecutions under a constitutionally vulnerable local statute. Under the principles firmly established by this

[9] We note, in passing, that the *Stanley* v. *Georgia* argument was impliedly rejected by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *State Amusement Corp.*, 248 N. E. 2d 497, which was decided on May 28, 1969, after the constitutional claim was made in oral argument (held shortly after the *Stanley* decision).

Court's unanimous holding in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), the court below was obliged to reach and decide the merits of the appellees' claim and reject the request to "abstain."

Zwickler involved—as does this case—a suit brought to declare a statute void under the First Amendment for "overbreadth" and to enjoin *future* prosecutions. Here, as in *Zwickler*, federal court jurisdiction was invoked under the Civil Rights Act of 1871, 42 U.S.C. 1983, and that made it the duty of the court below to consider the merits of the claim unless "special circumstances" (389 U.S. at 248, quoting from *Propper* v. *Clark*, 337 U.S. 472, 492 (1949)) warranted "abstention."[10]

The holding of *Zwickler*—that a claim of "overbreadth" violative of the First Amendment cannot be shunted aside by a federal court on the possibility that State courts may construe the challenged statute narrowly (389 U.S. 249-250)—fully disposes of the assertion made here by appellants that the Massachusetts Supreme Judicial Court may construe the local statute to obviate the constitutional problem presented by its conflict with *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (Juris. St. 10-11). Indeed, even under the standards applied in the separate concurring opinion of Mr. Justice Harlan in *Zwickler* (389 U.S. at 255-257), "abstention" is inappropriate here. For, as the

[10] Appellants' citation of *Cameron* v. *Johnson*, 390 U. S. 611 (1968) (Juris. St. 7), is wholly inapposite since the only issue in *Cameron* on which this Court held it appropriate for the federal courts to stay their hand was whether the plaintiffs were the subjects of good-faith erroneous application of a *constitutional* statute. This Court, in fact, passed on the claim that the statute was unconstitutionally overbroad—the very issue on which the court below found for appellees. 390 U. S. at 616-617.

majority below noted, it is "difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness" (Juris. St. 20). Hence there is no real possibility that "the federal constitutional issue might be mooted or 'presented in a different posture' by a state court determination of pertinent state law." 389 U.S. at 256. Nor can there be any claim here that the exercise of federal court jurisdiction "would disrupt a state administrative process . . . interfere with the collection of state taxes . . . or otherwise create needless friction" between the enforcement of state and federal policies." *Ibid.*

To be sure, there is presently pending a State court proceeding in which the constitutionality of the challenged statute and its applicability to the film "I Am Curious (Yellow)" are at issue. But that proceeding was instituted *after* the federal action commenced, and the court below demonstrated its sensitivity to considerations of federalism by refusing to interfere even with the subsequently instituted proceeding in order to give the trial court an opportunity to consider the constitutional and statutory issues. Surely the reluctance of the court below to take the legally permissible step of enjoining State criminal proceedings brought *after* the complaint was filed cannot be given the effect of precluding the more limited relief granted below—*i.e.*, an injunction against other future prosecutions.

Moreover, as this Court squarely held in *Zwickler* (389 U.S. at 251), reaffirming the principle applied in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." Nor would it have been appropriate for the

court below to deny relief to the appellees on the possibility that a Massachusetts appellate court might agree with the Court of Appeals for the Second Circuit and with a New Jersey trial court [11] which had found the film not obscene. As Judge Aldrich noted, it would be anomalous to "postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene." Juris. St. 21, n. 11 (emphasis in original).

There is, therefore, at least as much justification for federal court intervention here—to vindicate constitutional rights which will otherwise be destroyed—as in circumstances such as those presented in *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), now pending in this Court, No. 565, this Term. Here, as in *Stein* and *Dombrowski*, the local statute is attacked on its face as abridging free expression (380 U.S. at 489), and, as our Statement demonstrates, the court below went out of its way to avoid "needless friction" with State courts (*Reetz* v. *Bozanich*, No. 185, this Term, decided February 25, 1970, quoting from *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500) by deferring its own decision so that "the first judicial application" to appellees (*Reetz* v. *Bozanich*, *supra*) of the challenged statute should be by a State court.

The course followed by the court below is consistent with that recently taken by the three-judge district court in *Milky Way Prods., Inc.* v. *Leary*, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed *per curiam* by this Court on February 27, 1970, No. 998, this Term. In

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[11] *Lordi* v. *UA New Jersey Theatres, Inc. and Grove Press, Inc.*, Superior Court of New Jersey Chancery Division, Essex County (Civil No. C-737-69), decided December 9, 1969.

Milky Way, the district court considered complaints requesting declaratory and injunctive relief against the enforcement of local obscenity statutes. The court denied injunctive relief solely on the ground that criminal proceedings had been pending for three or four months in the State courts and the plaintiffs had made no effort to press their constitutional claims in those forums. 305 F. Supp. at 292. The court held, however, that under the *Zwickler* decision "the subjects of vagueness and overbreadth . . . are permissible for declaratory relief." *Id.* at 293. It then went on to consider the constitutional claims on their merits—as did the court below in this case.

Under the principles of *Zwickler* v. *Koota*, *supra*, and the legal doctrines refined in this Court's "abstention" decisions, the court below was and continues to be obliged to pass on the merits of appellees' request for a declaratory judgment that the Massachusetts statute violates the First and Fourteenth Amendments for overbreadth. Before making such a final determination, the court below considered the question of interlocutory relief—of whether to grant a preliminary injunction. In light of its views regarding the likelihood of success in the lawsuit and the irreparability of injury, it granted the temporary injunction at issue here.

That relief was fully justified by the record before the court. It was not necessary for the court to take extensive evidence on the harm accruing to appellees if relief were denied. It is a matter of common and general knowledge—not really subject to dispute—that the popularity of contemporary motion pictures which are nationally distributed, reviewed, and advertised is fleeting, and that a delay—as in this case—of months

or years in the exhibition of a picture will seriously diminish box-office receipts in an amount not subject to ready calculation.

It was not necessary for the court below to receive evidence on the "chilling effect" of an unconstitutionally overbroad statute. It was obvious to the court—and this became even more apparent once the State court proceeding resulted in a conviction and jail term—that the possibility of criminal penalties would effectively stifle the exhibition of the film even by those who were confident that the statute could not withstand constitutional challenge or that the film would ultimately be adjudged constitutionally secure against obscenity proceedings. Nor are film exhibitors the only or chief interests affected. The threat of further prosecutions, by dissuading a film's exhibitors, also deprives each member of the adult community of his right to see the film, his "right to read or observe what he pleases." *Stanley* v. *Georgia, supra.* For in this area, as surely as in the factual circumstances of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), vindication of First Amendment rights should not turn on the "improbability of successful prosecution . . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. To deny injunctive relief on the basis that rights could adequately be vindicated in the many State proceedings which would follow exhibition of the film would be to violate another principle fixed by this Court in *Dombrowski*—"that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious: aimed at hammering out the structure of the

statute piecemeal, with no likelihood of obviating similar uncertainty for others." 380 U.S. at 491.

This Court need not look beyond its own docket to see how extensive the harm may be if federal courts are barred from granting injunctive relief in circumstances such as those presented here. In *Shaw International Theatres, Inc.* v. *Municipal Court*, an Application for Stay has been filed to prevent 107 prosecutions by local officials in California against exhibitors of the film "I Am Curious (Yellow)." The probability of multiple prosecutions and harassment by local prosecutors if federal courts are disabled from granting injunctive relief is, as the California experience demonstrates, very high. Indeed, after the Boston proceedings, criminal prosecutions were instituted in various Massachusetts communities as a result of exhibition of the film. *E.g.*, Springfield District Court, No. SW 121 (October 29, 1969); Hampshire District Court, Complaints Nos. 7121, 7122 (November 5, 1969). The film is presently showing nowhere in the State of Massachusetts. In several other jurisdictions, federal district courts have granted injunctions against local prosecutions and harassment by local prosecutors of exhibitors of "I Am Curious (Yellow)" precisely because of the "chilling" effect of proceedings of this kind. See *Grove Press, Inc.* v. *Blackwell*, E. D. Mich., No. 3369 (September 5, 1969); *Lake City Cinema, Inc.* v. *Austin*, M. D. Fla., No. 70-15-Civ-J (January 13, 1970).[12]

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[12] See also Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 548-549 (1970):

> "Professor Freund, for example, believes that the existence of an affirmative remedy for a distributor should embrace the right to enjoin any criminal prosecutions for interim sales,

CONCLUSION

The coercive impact of State prosecutorial threats—especially when coupled with a stiff prison sentence meted out by a State court (in a subsequently instituted proceeding) to an exhibitor who showed the film on the basis of a high federal court's adjudication of its non-obscenity—is manifestly as effective a brake on the circulation of a film's images and ideas as the edict of any formal censorship board. The threats of the State prosecutor were subject to no judicial review and no adversary hearing. Yet they were as effective in blotting out the rights of the people of the State to see the film as the banning by the Maryland Board of Censors in No. 905. It is imperative to the security of First Amendment rights that the federal courts be enabled to prevent this kind of wholesale future abridgement of such rights by State law enforcement officials, particularly in the area of the performing arts. For, as everyone familiar with these arts knows, timeliness is of the essence in determining the acceptability and success of any particular work of art. In this realm the delay incident to extended judicial proceedings is nothing less than the equivalent of a death warrant.—

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since each interim sale would, of course, be a potential separate criminal offense [Footnote omitted]. In effect, the Constitution requires not only a prospective remedy but such coercive relief as is necessary to ensure protection of the first amendment right. This argument seems sound. The critical point is that the first amendment must guarantee not simply some prospective relief, but relief fully adequate to protect first amendment interest. The availability of relief with respect to interim sales, moreover, should not depend upon a substantial allegation that the prosecutor in fact intends multiple prosecutions. A distributor should not be at the mercy of the prosecutor and the changing pressures which influence prosecutorial discretion."

The court below properly weighed the need for preliminary injunctive relief in light of the harm which would surely result if appellees and other motion picture exhibitors who wished to show "I Am Curious (Yellow)" were put to the defense of criminal prosecutions under the challenged Massachusetts statute. What cannot be forgotten in the First Amendment area is that with motion pictures, as with books, "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith* v. *California*, 361 U.S. 147, 154 (1959); see also *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 681 (1968). The stark fact is that appellees and other film exhibitors in Massachusetts are not showing "I Am Curious (Yellow)" today because they have been threatened with criminal prosecution such as that already endured by these appellees under the second set of indictments, pursuant to a probably unconstitutional law. This form of government-instigated self-censorship is what the First Amendment prohibits, and it was to avoid this evil that the court below issued the order which is the subject of this appeal. Its

action was well-founded in law, reason and policy and should be summarily affirmed by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC. and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, City of Boston, County of Suffolk, Commonwealth of Massachusetts, *Plaintiffs*

v.

GARRETT BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, *Defendant*

Before ALDRICH, Circuit Judge, and JULIAN and PETTINE, District Judges

Ruling on Plaintiffs' Application for a Preliminary Injunction
June 24, 1969

In this three-judge court case plaintiffs seek a declaration that Mass. Gen. Laws c. 272, §§ 28A and 32, are unconstitutional. Although the allegations are not that simple, plaintiffs may be said to allege two basic grounds. The first is that their moving picture, "I Am Curious (Yellow)," was seized without an adversary preliminary hearing in alleged violation of their First Amendment rights. Neither statute makes any provision covering this matter. The seizure was effected as a result of a search warrant issued on the basis of an affidavit. We do not recognize, nor are we asked to recognize, *in limine* jurisdiction to vacate improperly issued search warrants, if this one be assumed to be such. The statutes are not unconstitutional merely because the prosecution conducted, if it did, an improper search for evidence.

Secondly, sections 28A and 32 may appear to be unconstitutional on their face in that they make criminal the publication of obscene matter in the absence of knowledge of the content of the publication. *Cf. Smith v. California*, 1959, 361 U.S. 147. The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. *Demetropolos v. Commonwealth*, 1961, 342 Mass. 658. The court has not passed upon section 32 in this respect.

It was stated in open court that the indictments pending against plaintiffs in the state Superior Court do not contain an allegation of defendants' knowledge of the content of the picture. If the statute impliedly contains such a requirement we would suppose that it should be alleged, for in the absence of such allegation the grand jury might have indicted without finding probable cause as to that element of the offense.

A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we will assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

Under the circumstances we shall issue a temporary injunction restraining the prosecution of the state court

proceedings pending further order of this court other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

/s/ BAILEY ALDRICH
/s/ ANTHONY JULIAN
/s/ RAYMOND J. PETTINE

APPENDIX B

Temporary Injunction
June 24, 1969

After due notice and hearing, and pursuant to this Court's ruling filed this day on the plaintiffs' application for a temporary injunction, it is hereby ordered that pending further order of this Court the defendant, Garrett Byrne, as he is the District Attorney for the County of Suffolk, Commonwealth of Massachusetts, be and he is hereby restrained from prosecuting the indictments pending against the plaintiffs herein in the Superior Court in and for said County, being criminal cases numbered 42587 through 42592, other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

/s/ .....

/s/ .....

/s/ .....

APPENDIX C

Motion To File an Amendment to Amended Complaint—II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Plaintiffs move the Court for leave to file a further amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMENDED COMPLAINT—II (Following Dismissal of Original Indictments In Suffolk Superior Court).

Attorney for Plaintiffs,

.....

Herbert S. Swartz
1330 Beacon Street
Brookline, Massachusetts

Amendment to Amended Complaint—II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Now come the plaintiffs in the above matter and hereby move that the following allegations be added to Page 6 of their Amended Complaint, as follows:

(17) Following hearing of this case before a three-judge court, the said three-judge court on Tuesday, June 24, 1969, did issue a temporary restraining order against the pending state indictments as aforesaid.

(18) The attorney for the plaintiffs herein, the defendants in Suffolk Superior Court, did make a motion in Suffolk Superior Court before Judge Tauro on Wednesday morning, June 25, 1969, to have the pending indictments dismissed. This motion was assented to by the Commonwealth and said indictments have now been dismissed, being all of the indictments set forth as aforesaid in this Complaint.

(19) That request has now been made to the attorney for the plaintiffs herein by the Office of the Suffolk County District Attorney that the said attorney make available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)." This print will be used for any further investigations to be made by the Office of the Suffolk County District Attorney, and for further use if necessary if presentation is made to the Grand Jury sitting for and of the County of Suffolk for the return of indictments against your plaintiffs herein, similar to the original indictments for which this Complaint was brought. The attorney for the plaintiffs herein has made available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)," and in furtherance of the request made by the Office of the Suffolk County District Attorney, this print may be used for whatever purposes are necessary at trial of the plaintiffs herein, if indictments are returned against them in Suffolk County by the Grand Jury.

(20) On information and belief, the plaintiffs herein say that they do anticipate that further indictments will be sought against them by the Office of the Suffolk County District Attorney for alleged violations of Section 28A of Chapter 272 of the Massachusetts General Laws. That prosecution for an offense under Section 28A would require that the defendants "know the work to be obscene," *Demetropolos* v. *Commonwealth*, 342 Mass. 658 (1961).

(21) That in reliance upon *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), the Massachusetts Supreme Judicial Court still follows the criteria set up in that case for the constitutional definition of obscenity—(1) That the dominant theme of the work appeals to a prurient interest in sex; (2) That the work is patently offensive to contemporary community standards of sexual representation or

description; and (3) That the work is utterly without social value. See *Commonwealth* v. *State Amusement Corporation,* Paragraph 10 of the Amended Complaint, *supra.*

* * *

II

The plaintiffs in the above matter further and hereby move this Honorable Court to amend their Complaints by deleting Prayers (5) and (6), originally on Page 8 of their Amended Complaint, as added to it by the Amendment to the Amended Complaint, and that following deletion of said Prayers (5) and (6), the following prayers be added in their place as follows:

(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional on its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U.S.C., Section 2201.

(6) That this Court declare and say that the motion picture "I Am Curious (Yellow)" is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York,* 386 U.S. 767 (1967). See also *Books, Inc.* v. *United States,* 385 F. 2d 935 (1 Cir. 1966), rev'd 388 U.S. 449 (1967).

(7) That this Court restrain any future prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" within the terms of Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could "know the work to be obscene."

(8) That any further prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" and therefore violative of Section 28A of Chapter 272 of Massachusetts General Laws be re-

strained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup v. New York, supra,* are that—(1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a "pandering" manner.

(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture "I Am Curious (Yellow)" on the grounds that any prosecution is "without hope or success," in that given the decision of the Second Circuit, no prosecution could hope to prove that this film is "utterly without social value" or that it is "patently offensive to contemporary community standards of sexual representation or description," interpreting the word "community" as implying a *national* standard. See *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Manual Enterprises v. Day*, 370 U.S. 478 (1962); and *In re Gianini*, 72 Cal. Rptr. 655 (1968).

(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law.

Plaintiffs, Serafim Karalexis, James Vlamos, Symphony Cinema II, Inc., and Film Distributors, Inc.,

By their Attorney,

/s/ .....
Herbert S. Swartz

APPENDIX D

Memorandum and Rulings on Motion To Further Amend Complaint, on Motion To Intervene, and on Motion for Preliminary Injunction

July 15, 1969

The motion to further amend the complaint is allowed.

The motion for leave to intervene is denied. (Proposed intervenor may file an amicus brief at such times as briefs may be appropriate.)

The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur.

Although the court has allowed the motion to further amend, it will not consider now or at any time the claim that petitioner's film is not obscene, as an evidentiary matter. The court may consider ruling on the question whether the statute is unconstitutional on its face, or whether it is unconstitutional to prosecute an obscene publication not conspicuously or pruriently advertised and not available to minors.

The court presently invites briefs on the following questions:

If an adult individual may view obscene material in the privacy of his home,

a) can he purchase obscene material for such purpose?

b) can he invite friends to the viewing?

c) can he go to a private place to view such material?

d) can a group of persons go to such private place?

e) can they go to an adequately controlled public place?

/s/ Bailey Aldrich
/s/ Anthony Julian
/s/ Raymond J. Pettine